Supreme Court, U.S.
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**UNITED STATES SUPREME COURT**

**October Term, 1998**

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**BRAD GOODSPEED**, *Petitioner,*

*-vs-*

**WHITMAN COUNTY**, *Respondent.*

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# PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**I.** Whether a State Environmental Policy Act and permitting process is a protectable property interest when that Act lacks discretionary factors and a successful completion of that review provides a reasonable expectation of an issuance of a permit to operate?

II. When a provision of a State Administrative code is silent on due process in a land use decision does it allow that State, or one of its political subdivisions, the right to circumvent the constitution and violate a citizens right to due process of the Fourteenth Amendment?

III Weather the District Court can replace a jury in deciding factual issues relative to the equal protection claim?

## LIST OF PARTIES

The following persons and entities participated in the case below and are petitioners here:

Brad M. Goodspeed
PacWest Premix Inc.

Respondent Whitman County was the only party in the court.

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## PETITION FOR WRIT OF CERTIORARI

Brad Goodspeed, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit, No. 97-35227.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The original action came before the courts below under 42 U.S.C. sec. 1983. Therefore, the courts below had federal question jurisdiction to decide the original matter under 28 U.S.C. secs. 1331 and 1343(3). This Court has jurisdiction to consider this Petition under 28 U.S.C. sec. 1254.

## STATEMENT OF THE CASE

Brad Goodspeed ("Mr. Goodspeed") had been operating a concrete mixing company, PacWest Premix.

Initially, his operation had been located in Idaho. But the lease for his Idaho site was to run out in June of 1992. A new site needed to be found, or the PacWest Premix operation would be forced to shut down. Mr. Goodspeed thought he had secured an appropriate site in Whitman County, Washington, the "Ranninger Site." This location was, however, zoned for agricultural use.

In June of 1991, Mr. Goodspeed filed a re-zone application and environmental checklist with Whitman County. By letter dated July 21, 1991, Whitman County Planner Mark Bordsen ("Mr. Bordsen") informed Mr. Goodspeed that certain technical difficulties, not at issue in this appeal, would prevent Whitman County from making a determination on Mr. Goodspeed's re-zone application without changes to Mr. Goodspeed's pro-

posal. Mr. Goodspeed submitted a second environmental checklist.

Several months later, on November 21, 1991, a "Determination of Non-Significance" ("DNS") was issued by Whitman County. The effect of a DNS under the Washington State Environmental Policy Act ("SEPA"), Wash. Rev. Code § 43.21C *et seq.*, was to relieve Mr. Goodspeed of the need to prepare an environmental impact statement. Subsequently, Whitman County received comments opposing Mr. Goodspeed's development and alleging various reasons why the development should not be allowed to proceed--all of which Mr. Goodspeed denies. However, based solely on these statements and without a factual determination as to their validity, Whitman County decided to hear an "appeal"

on February 26, 1992. Nevertheless, the DNS was upheld by Whitman County on March 2, 1992. But Mr. Goodspeed's fortunes turned for the worse only fifteen day later when, by letter dated March 17, 1992, Mr. Bordsen wrote Mr. Goodspeed giving him notice that Whitman County intended to cancel the zoning change hearing previously set for April 1, 1992. Frustrated by a process he did not understand and out of time, Mr. Goodspeed was unable to go forward with moving the PacWest Premix operation to the Ranniger Site.

Instead, Mr. Goodspeed looked for another site and found a suitable site, the Garret Site. It had the advantage of already having the appropriate zoning, "heavy industrial." On April 27, 1992, Mr. Goodspeed submitted an environmental checklist to Whitman County. On

April 30, 1992, Whitman County issued a DNS. However, once again Whitman County received "public comment" opposing Mr. Goodspeed's proposed development. Regardless, Mr. Bordsen once again upheld the DNS after appeal on May 20, 1992. Cryptically, Mr. Bordsen gave Mr. Goodspeed notice that moving the PacWest facility to this site would be at his (Mr. Goodspeed's) own risk because it might be overturned on appeal. (Whitman County's summary judgment pleadings, Ex. 13 of Aff. of Bordsen at 9.)

As might be expected in the history of Mr. Goodspeed's zoning application, several letters were received by Whitman County. One raised issues concerning the satisfaction of PacWest's water needs. The other alleged

that the proposed site for PacWest was on a 100-year flood plain.

On June 10, 1992, Whitman County decided, based allegedly on Flood Insurance Rate Maps, that one-third to one-half of the Garrett Site was in the 100-year flood plain. Although the maps that Whitman County used had been directly incorporated into its zoning code, it had "apparently" not noticed this problem before. The next day, June 11, 1992, Bordsen contacted Carol King and told her the PacWest building permit would be re-scinded until the "flood plain" issue was resolved.

On June 12, 1992, Mr. Goodspeed discussed the water needs issue with Mr. Bordsen and informed him that he had reached an agreement with a neighboring landowner for use of additional well water that would

allow him to limit use of the well on the Garrett site to supplying office needs.

On June 16, 1992, Whitman County withdrew the DNS, citing Wash. Admin. Code § 197-11-340(3)(a)(iii) and alleging that: (1) Mr. Goodspeed had misrepresented to Whitman County that the property was located in a flood plain; and (2) that Mr. Goodspeed had failed to disclose that the Garrett site lacked adequate water. Mr. Goodspeed denies that he either misrepresented to Whitman County or failed to disclose significant facts on the environmental checklist.

On June 18, 1992, Mr. Goodspeed submitted a survey to Whitman County showing that only 7% of the total Garrett site was within the 100-year flood plain as compared to the one-third to one-half Whitman County

claimed. Mr. Goodspeed then engaged in a process of revising the environmental checklist with Whitman County. Whitman County issued a final environmental checklist for the Garrett site on July 20, 1992. This resulted in the issuance of a "Mitigated Determination of Non-Significance" ("MDNS") by Whitman County on July 21, 1992. Public notice of the MDNS was issued on July 23, 1992. Two environmental groups submitted letters to Whitman County opposing the PacWest development which it rejected in Mr. Bordsen's decision. Whitman County then issued a "Notice of Decision on Comments to Mitigated Determination of Non-Significance" on August 27, 1992.

Both environmental groups appealed on September 11, 1992. On October 5, 1992, Whitman County

held an appeal hearing which was taken by it under advisement by its decision of October 12, 1992. On November 9, 1992, Whitman County affirmed the MDNS, and it supported this decision with findings of fact and conclusions of law on November 16, 1992. However, by this time, Mr. Goodspeed had been forced to remove the PacWest operation from its Idaho lease site, and the repeated delays in obtain permission to build made this victory a hollow one for Mr. Goodspeed.

Mr. Goodspeed initiated suit *pro se* against Whitman County, and other defendants, in two separately filed, but otherwise identical actions filed both in Spokane County Superior Court and the United States District Court for the Eastern District of Washington. He elected ultimately to proceed on the federal action and

dismissed the state action. In his action, he alleged that his rights to substantive and procedural due process had been violated under color of law by Whitman County in that he had first been provide with a DNS (and permission to enter and build on the site) only to have it taken from him. He also alleged that Whitman County had denied him equal protection under the law by discriminating against him. Finally, he also alleged that Whitman County's actions had amounted to a taking in his property rights.

On January 30, 1997, United States District Court for the Eastern District of Washington, the Honorable Robert H. Whaley, presiding, entered an order granting Defendant Whitman County's motion for summary judgment. The district court considered Whitman

County's motions for Dismissal or Other Sanctions for Discovery (Ct. Rec. 48), for Summary Judgment (Ct. Rec. 67), and for Dismissal Based on Insufficiency of Service of Process (Ct. Rec. 80), and Brad Goodspeed's responses during oral argument conducted on January 24, 1997.

## ARGUMENT

I. THE CONSTITUTION GUARANTEES MR. GOODSPEED'S RIGHT TO DUE PROCESS IN LAND USE DECISIONS AND HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS CLAIMS SHOULD HAVE SURVIVED SUMMARY JUDGMENT.

Mr. Goodspeed's substantive and procedural due process claims should have survived summary judgment. Mr. Goodspeed has a protectable property interest that is an element of such claims. A protectable property interest exists when the plaintiff has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law. Wedges/Ledges of California v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Because a DNS dispenses with need to file an environmental impact

statement, its issuance by a county usually indicates that the zoning proposal will be approved. See Wash. Admin. Code §§ 197-11-340(1) and 197-11-360. Once a DNS is procured special circumstances, such as establishing that "[t]he DNS was procured by misrepresentation or lack of material disclosure", Wash. Admin. Code § 197-11-340(3)(a)(iii), are necessary before the DNS determination will be reopened and a revised environmental checklist required. The preceding administrative code section is absolutely silent however on how such a determination should be made. The district court speculates that such a determination could be made in a "closed-door review" or by a formal appeal process. Opinion at 4. However, the district court fails to determine whether the "closed-door review" which was in

fact employed against Mr. Goodspeed comports with either substantive or procedural due process, as it must. "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." Mathews v. Eldridge, 424 U.S. 319, 348 (1976). The district court interprets the silence of the administrative code as providing Whitman County with a "green light" to engage in "closed-door review" to determine his property rights, but there are two problems with this analysis that are fatal: (1) it really does not address whether Mr. Goodspeed had a protectable property interest; and (2) assuming, in the light Mr. Goodspeed is entitled to as the non-moving party, that Mr. Goodspeed has a protectable right, it fails utterly to apply the law to

that right. In fact, the district court concedes that "[w]ithdrawal of a DNS may well be a rare occurrence." Opinion at 9. This concession places Mr. Goodspeed in a better factual position than the plaintiff in Wedges/Ledges, who nevertheless was found to have a protectable property interest because of the gaming code's absence of "any open-ended discretionary factors." Wedges/Ledges, 24 F.3d at 62. The administrative code in this case also lacks such "discretionary factors" since a new environmental checklist shall be prepared only if the DNS "was [in fact] procured by misrepresentation or lack of material disclosure." Wash. Admin. Code § 197-11-340(3)(a)(iii). The silence of this provision on what level of due process Mr. Goodspeed is entitled to does not negate his claims, it estab-

lishes them precisely because Whitman County could negate his property rights by factual findings against him to which he has no right to contest. In point of law, the district court's opinion "begs the question" by glossing over whether Mr. Goodspeed got the due process the Constitution guarantees him.

The district court attempts to get around this by finding on the record before it that Mr. Goodspeed had engaged in misrepresentation or material non-disclosure. Opinion at 11. This a factual determination, that the district court attempts to resolve without a trial, deny Mr. Goodspeed his right to a jury trial. A plaintiff defending against a summary judgment motion need only make a showing of a prima facie claim to withstand summary judgment. Celotex Corp. V. Catrett, 477 U.S. 317, 324

(1986). Such a showing consists of designating "facts showing that there is a genuine issue for trial." Id. Mr. Goodspeed denies that he either misrepresented or materially non-disclosed to Whitman County. That places the factual issue in dispute, and should have resulted in summary judgment being denied. And on the legal question, whether Mr. Goodspeed was entitled to more than a "close-door review," the district court utterly failed to apply the appropriate law and determine that when Mr. Goodspeed's right to use property is at stake, something more than an unreviewable secret decision is necessary.

Moreover, both the water issue and the flood plain issue are substantially disputed. The district court concedes as much when it admits that, had Mr. Goodspeed

been provided with a hearing, Mr. Goodspeed would have been able to present evidence establishing that the PacWest plant would not have occupied any of the 7% of the land that was in the 100-year flood plain. Opinion at 12. Mr Goodspeed responded to the question asking if the **proposal** lay within the 100 year flood plain and it was the proposed construction of the cement silo and associated air quality permit that triggered the SEPA process and the succesfull completion of the SEPA process becomes the "issuance" of the air quality permit. Had they wanted to know if the "Property" or "Land" lay withinin the the 100 year flood plain, one would assume they would ask the question implementing that language. And it was never Mr. Goodspeed's contention that the well on the Garrett property was going to be the sole

source of his water for the PacWest operation, similar applications have been afforded the oportunity the haul in the water by truck for batching purposes. The original application was for a "temporary" batch plant and it was by only the "assumption" of the planning department that it was processed as a permanant application. However, by conducting "closed-door review," Mr. Goodspeed was denied any reasonable, timely opportunity to avoid this crucial finding against him--effecting a taking of Mr. Goodspeed's otherwise reasonable right to engage in business and use property.

## I I. THE CONSTITUTION PROTECTS MR. GOODSPEED'S RIGHT TO REASONABLE, CONSISTANT, AND FAIR LAND USE DECISIONS SUCH THAT HIS EQUAL PROTECTION CLAIM SHOULD HAVE SURVIVED SUMMARY JUDGMENT.

The district court improperly dismissed Mr. Goodspeed's equal protection claim because it once again took the place of a jury and decided the factual issues. The district court attacked Mr. Goodspeed's equal protection claim by alleging that he had neither direct nor indirect evidence of discriminatory intent. Opinion at 12-13. Against this, Mr. Goodspeed presents the circumstances that each time he was close to approval such that he could start work, Whitman County changed the rules and prevented him from doing so. Mr. Goodspeed also presents his allegation that a County Commissioner told him he would never get the Ranniger Site re-zoned. On these disputed facts, summary judgment was improperly granted.

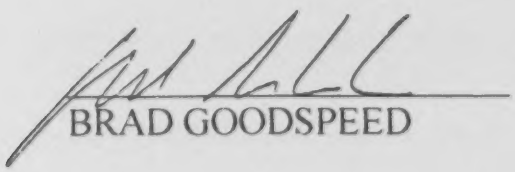
Moreover, such activity by the County represents the very worst of land use planning and regulation. If land use planning and regulation are to provide business land users reasonable due process and reasonable use of County land, the law must restrain the County from engaging in the tactics it engaged in here. The Constitution demands no less--vaulting property rights to a high and proper place in a free society.

## CONCLUSION

For all the above reasons, the district court's dismissal of Mr. Goodspeed's claims on the basis of summary judgment should be reversed and his matter remanded for trial.

Respectfully submitted,

DATED: April 1, 1999



BRAD GOODSPEED

## APPENDIX

**I.** OPINIONS BELOW:

**A1 TO A14**: District Courts ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, *I NTER ALIA* No. CS-95-229-RHW (entered January 31, 1997 )

**A15 TO A16**: Ninth Circuit Court of Appeals MEMORANDUM AFFIRMING DISTRICT COURTS ORDER, No.97-35227 (entered September 18, 1998)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

| | | |
|---|---|---|
| BRAD M. GOODSPEED, *et al.*, | ) | |
| Plaintiffs, | ) | NO. CS-95-229-RHW |
| v. | ) | |
| WHITMAN COUNTY, | ) | **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,** |
| Defendant. | ) | ***INTER ALIA*** |

Before the Court are Defendant's Motions for Dismissal or Other Sanctions for Discovery (Ct. Rec. 48), for Summary Judgment (Ct. Rec. 67), and for Dismissal Based on Insufficiency of Service of Process (Ct. Rec. 80). These motions were heard with oral argument on January 24, 1997. Plaintiff appeared and was represented by Chris Johnson. Defendant was represented by Guy Nelson.

**1. DEFENDANT'S MOTION FOR DISMISSAL OR OTHER SANCTIONS FOR DISCOVERY**

Defendant seeks dismissal of this action because, in filing the original Complaint, Plaintiff did not properly effect service when he served each member of the Whitman County Board of Commissioners ("the Board") at a regular meeting. Defendant contends that this was insufficient because it did not include service on either the county auditor

or the county sheriff, as required by Fed. R. Civ. P. 4(j)(2) and Wash. Rev. Code 4.28.080(l), 36.28.010. Although Plaintiff does not dispute the fact that service of the original Complaint was not executed on the county auditor or sheriff, Defendant's motion must fail. So long as there has been "substantial compliance with Rule 4 of the Federal Rules of Civil Procedure, "a general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) (citation omitted); Fed. R.Civ. P. 12(h)(1) (insufficiency of process waived if it is omitted from a motion under Rule12, a responsive pleading, or an amendment thereof under Fed. R. Civ. P. 15(a)). "An appearance ordinarily is an overt act by which the party comes into court and submits to the jurisdiction of the court. This is an affirmative act involving knowledge of the suit and an intention to appear." *Benny v. Pipes*, 709 F.2d 489, 492 (1986), *as amended*, 807 F.2d 1514 (9th Cir. 1987), *cert. denied*, 484 U.S. 870 (1987).

Although Defendant's Answer, filed on June 20, 1996 (Ct. Rec. 31), and Amended Answer, filed on September 20, 1996 (Ct. Rec. 47), both preserve this issue, before filing any responsive pleading, Defendant filed two Notices of Appearance (Ct.Recs. 3 & 7), neither of which preserves this issue. As such, insufficiency of process was probably waived prior to service of the Answer. Moreover, prior to filing the original Answer, Defendant appeared at several status conferences (August 23, 1995, November 2, 1995, and May 29, 1996), filed status certificates and supplements thereto (September 18, 1995 and October 30, 1995), initial disclosures (September 25, 1995), contested withdrawal of Plaintiff's attorney (April 22, 1996), and filed a motion to compel discovery (May 20, 1996). Further, following the filing of the Answer, but prior to moving for dismissal for insufficiency of process on December 2, 1996, Defendant filed and vigorously pursued several motions regarding pretrial discovery (July 15, 1996,October 11,1996, and October 26, 1996 (renoting previous motion)), some of which included requests to dismiss this action.

The Court denies Defendant's motion in light the sufficiency of Plaintiff's service of the Amended Complaint, as well as Defendant's

clear demonstration of an intention to defend this suit, its actual knowledge of the Plaintiffs' claims, and its failure to demonstrate prejudice.

## 2. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant seeks judgment as a matter of law on Plaintiff's three claims under 42 U.S.C. 1983 for denial of equal protection of the laws and denial of property without substantive and procedural due process.

### a. Background

#### i. Washington State Environmental Policy Act

This case involves application of the Washington State Enviromental Policy Act ("SEPA"), Wash. Rev. Code 43.21C *et seq.* The SEPA process begins with submission of an environmental checklist, which is initially reviewed by the lead agency. Wash. Admin. Code 197-11 - 100; 197-011-960. The agency may require the applicant to submit more information, undertake its own study, or consult with other agencies regarding the environmental impact of the proposal. *Id*; Wash. Admin. Code 197-11-335. Based on the environmental checklist and other information, a threshold determination is made and memorialized as either a determination of significance, which requires a further environmental impact statement, or as a determination of non-significance ("DNS"). Wash. Admin. Code 197-11-310, 197-11-340(l). A DNS dispenses with the necessity of preparing an environmental impact statement and may be issued only if the responsible official determines that there will be "no probable significant adverse environmental impact" from a proposal. Wash. Admin. Code 197-11-340(l),197-11-360. Until such time as the threshold determination is made, the applicant may revise or clarify any information in the environmental checklist. Wash. Admin. Code 197-11-100(2). Thereafter, regulations provide that the applicant may make revisions only by means of the commenting procedures outlined in Wash. Admin. Code 197-11-340 & 197-11-360. In accordance with these provisions, public notice of

a threshold determination must be given by publication in a newspaper of general circulation. Wash. Admin. Code 197-11-5 10. Pursuant to Wash. Admin. Code 197-11-340(l), the lead agency could not act upon the proposal for fifteen days after the issuance of the DNS, during which time any person or agency could comment. Thereafter,

> [t]he responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS....

Wash. Admin. Code 197-11-340(2)(f). Further, Wash. Admin. Code 197-11-340 provides an alternate means for withdrawal of a DNS. It mandates that the lead agency withdraw a DNS if.

> (iii) **The DNS was procured by misrepresentation or lack of material disclosure**; if such DNS resulted from the actions of an applicant, a subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

Wash. Admin. Code 197-11-340(3)(a)(iii) (emphasis added). This provision does not, however, indicate the procedural mechanism by means of which such a decision would be made. Conceivably, such a decision could be reached by means of a closed-door review conducted in much the same way as the reconsideration process undertaken by the responsible official, or such a decision could be reached by means of the appeals process, in accordance with Whitman County Ordinance 9.04.080(C). Appeals must be heard at "a regular meeting" of the Board, the date for which shall be set by the chairman of the Board, within 30 days of the filing of the letter of appeal. Whitman County Ordinance 9.04.080(C) (1979). At least ten days prior to such a meeting, the county auditor must mail notice thereof to the appellant, at the appellant's last known address or to the address stated in the letter of appeal.

**ii. Facts**

Plaintiff's claims revolve mainly around the allegedly unconstitutional delay he suffered in attempting to relocate his concrete mixing company, PacWest Premix, when its lease ran out in June, 1992. Initially, Plaintiff secured the Ranninger Site, which was zoned only for agricultural use. In June 1991, Plaintiff filed a re-zone application and an environmental checklist. By letter dated July 12, 1991, County Planner Mark Bordsen ("Bordsen") informed Plaintiff that, due to issues not relevant here, no determination would be made regarding Plaintiff's property unless Plaintiff changed or clarified his proposal. Accordingly, Plaintiff submitted a second environmental checklist.

On November 21, 1991, a DNS was issued and published, thus relieving Plaintiff of the requirement of preparing an environmental impact statement. During the fifteen day comment period, comments were received that were treated as appeals and were heard by the Board on February 26, 1992. Following this, the Board upheld the DNS on March 2, 1992. Subsequently, by letter dated Ma rch 17,1992. Bordsen wrote to Goodspeed canceling a zone change hearing set for April 1 1992, for reasons not relevant to this opinion. Thereafter, no further action was taken by either party. Plaintiff explains that he elected not to pursue building on the Ranninger Site because he was discouraged by the process and did not believe that he would obtain a zone change based, in part, on comments made by unidentified persons indicating that one of the commissioners had so indicated.

Plaintiff then sought and found the Garrett Site, which was already zoned "heavy industrial" and did not need to be re-zoned for Plaintiff's business. On April 27,1992, Plaintiff submitted an environmental checklist for this site, and on April 30, 1992 a DNS was issued. The 15 day comment period ended on May 15, 1992, before which several comments were received from the public. After considering these comments, County Planner Bordsen upheld the issuance of the DNS on May 20, 1992. Plaintiff was so informed by means of a letter from Bordsen, which also stated:

> This completesthe SEPA process for the temporary Pac West PreMix Inc., Concrete Plant project. However, there is a fifteen day appeal period allowed by the.County's

> SEPA Ordinance. We expect that all parties will have received this notification and decision by Tuesday, May 26 1992 and have therefore set the end of this appeal period for June 10, 1992. **This decision allows the applicant to proceed with the permit applications as needed at the applicant's own risk that the decision could be appealed and overturned.**

Exhibit 13 to Affidavit of Mark Bordsen, p. 9 (emphasis in original).

Prior to expiration of the appeal deadline, several letters were received, alerting Defendant to, among other things, two issues of concern. One was from Mr. and Mrs. Wendt, indicating that their adjacent residence obtained water from a well located on the Garrett Site. They expressed concerns regarding the adequacy and purity of the water supply if used by Plaintiff in the manner suggested by the environmental checklist. Plaintiff"s April 27, 1992 environmental checklist failed to indicate the source of the water that would be used by the plant. Specifically, the environmental checklist asks, "Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known." In response, Plaintiff stated, "Our present usage as indicated by meters is 4,000 gallons per day. May to October." Exhibit 10 to Affidavit of Marc Bordsen, Environmental Checklist, p. 3. Plaintiff does not dispute the fact that this well was intended to provide water for his plant and for the Wendt's residence. He states, however, that he thought this was not significant as there was an off-site well he planned to use for production needs, leaving the shared well to be used for domestic and office needs.

Another letter raised concerns that Plaintiff intended to construct on a 100 year flood plain despite Plaintiff s statement to the contrary in the environmental checklist. Specifically, the environmental checklist asked, "Does the proposal lie within a 100-year floodplain? If so, note location on the site plan," to which Plaintiff responded "No." Exhibit 10, Enviromental Checklist 5, p. 3.

According to the Affidavit of Mark Bordsen, on June 10, 1992, Bordsen asked an employee of the Department of Public Works to

prepare a drawing, which indicated that one-third to one-half of the site was located within the flood plain. The boundaries were determined using the Flood Insurance Rate Maps, which were adopted by and incorporated into the Whitman County Zoning Ordinance. The following day, on June 11, 1992, Bordsen spoke with Carol King, the contact person listed on the environmental checklist. Bordsen explained that the building permit would be rescinded until the flood plain issue was resolved, which could be done by proving that the location was not within the flood plain, obtaining a variance, or siting the structure beyond the flood plain. He also explained that it had come to his attention that the well was subject to an agreement for water usage by the Wendts, which had not been disclosed in the Environmental checklist and could harm the neighbor. On June 12,1992, Bordsen and Goodspeed spoke, Goodspeed telling Bordsen that he had made an agreement with an adjoining land owner for use of their well and explaining that the water from the well would be used only for office purposes. Bordsen explained to Goodspeed that the flood plain issue would need to be addressed in one of the three ways he had described to Carol King.

Thereafter, by means of an order issued June 16, 1992, the Board withdrew the DNS, citing Wash. Admin. Code 197-11 340(3)(a)(iii) and stating:

> (C) In its Environmental Checklist, Pac-West misrepresented the fact that the parcel in question was located or partially located within a flood plain.
>
> (D) In its Environmental Checklist, Pac-west failed to disclose that the on-site well was shared by an adjacent resident that the well's capacity was not sufficient to accommodate Pac-West's potential water quantity use, and/or that there is a high potential for complete drainage of the on-site well, all of which either together or singularly are material to an investigation of the environmental impact of Pac-West's proposal.

Exhibit 19 to Affidavit of Mark Bordsen, In re: *Brad Goodspeed, d/b/a Pac- West Pre-Mix*, p. 3.

Following the revocation of the DNS, on June 18, 1992, Plaintiff submitted a survey indicating that 7% of the total Garrett Site was within the flood plain, an area smaller than that demonstrated by the flood insurance rate maps. On July 6, 1992, Bordsen sent Plaintiff a draft environmental checklist for comment. After a subsequent revision, Goodspeed accepted issuance of a Mitigated Determination of Non-Significance ("MDNS"). On July 20, 1992, Bordsen issued a final environmental checklist for the Garrett Site, and on the following day, he issued the MDNS.

Notice of the issuance of the MDNS was published on July 23, 1992. Prior to expiration of the comment period, Defendant received a letter from Friends of the Corridor and Palouse-Clearwater Environmental Institute. By means of a memorandum, Bordsen rejected the comments of these groups, and subsequently on August 27, 1992,a Notice of Decision on Comments to Mitigated Deteri-nination of Non-significance was published. On September 11, 1992, both groups filed appeals. A hearing was held within thirty days on October 5, 1992 and the appeals were taken under advisement by means of a decision issued on October 12, 1992. The Board concluded that it needed to await development of additional information by county staff based on receipt of a letter from the lessor of Plaintiff's Moscow plant site, alleging that Plaintiff had not properly cleaned the site. It indicated that such information would likely be available by October 14 or 15, 1992. On November 9, 1992, the Board issued a decision affirming the MDNS and on November 16, 1992, it entered findings of fact and conclusions of law in support of that decision.

**b. Substantive and procedural due process claims**

Plaintiff's substantive and procedural due process claims both fail because Plaintiff has not made the threshold showing of a protectable property interest, which is a prerequisite to bringing such claims. *Wedges\Ledges of Cal. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994) (citing *Board ofRegents v. Roth*, 408 U.S. 564, 569 (1972)); *see also Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995) (using traditional entitlement analysis to examine substantive due process claim arising from revocation of building permit). A protectable property interest is

present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law. *WedgeslLedges*, 24 F.3d at 62(citations omitted).

Plaintiff claims a protectable property interest in the DNS, arising from his reasonable expectations that (1) a withdrawal of a DNS would be extremely.rare, (2) an appeal of the DNS for the Garrett Site would permit him the opportunity to be heard, in accordance with local ordinances, and (3) there existed a strong likelihood that he would obtain the DNS.

Withdrawal of a DNS may well be a rare occurrence. Nevertheless, such a subjective expectancy, without more, creates no constitutionally protected interest. *Perry v. Sinderman*, 408 U.S. 593, 601-2 (1972).

Nor is such an interest created by Plaintiff's expectation that this case would be treated as an appeal. As stated, Wash. Admin. Code 197-11-340(3)(a) requires the lead agency to withdraw a DNS if it was procured by misrepresentations or material non-disclosures. As Plaintiff conceded at oral argument, there is nothing in SEPA or any of the regulations cited that requires this to be treated as an appeal. Without such a provision or a demonstration that the County had limited itself by means of an ordinance or otherwise to considering withdrawal of a DNS only in the context of an appeal, Plaintiff's argument that he was entitled to a hearing appears to fail.

Plaintiff appears also to argue that he had a property interest in the appeal procedure itself. Whether a property interest can arise from this procedural mechanism, alone, depends upon whether and to what extent the statute contains mandatory language that restricts the discretion of the relevant agency to revoke a DNS. *Jacobson v. Hanniflin*, 627 F.2d 177, 180 (9th Cir. 1980). Here, withdrawal of a DNS became mandatory if the lead agency found that it had been procured by misrepresentation or lack of material disclosure. Wash. Admin. Code 197-11-340(3)(a)(iii). No statute requires that the decision of the lead agency regarding misrepresentations and non-disclosures be made only by means of an

appeal. As such, no protectable property interest can exist in the actual appeal process itself.

Plaintiff's final argument also fails. Plaintiff claims that a property interest in the DNS arose because he was significantly likely to receive and maintain the DNS. Using the test adopted in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985) (no property interest where plaintiff's application might properly have been denied by the Zoning Board of Appeals),

> the question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. Otherwise the application would amount to a mere unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the Fourteenth Amendment.

*Id.* at 59. *See also Tyson v. City of Sunnyvale*, 920 F. Supp. 1054, 1061 (N.D. Cal.1996) (applying *Yale Auto Parts* test to landowners' challenge to municipality's rejection of their re-zoning application).

Two issues were raised as the basis for revoking the DNS: the well and the flood plain. Although these two issues were ultimately resolved to the satisfaction of the Board such that it was willing to affirm a mitigated DNS, the Board appears to have been fully justified in concluding that there had been misrepresentations or non-disclosures. First, as regards the well, following expiration of the comment period, Plaintiff spoke with Bordsen and explained how, in fact, the plant was going to use water - i.e., by using a neighboring well for the plant's operations and the shared well for office and building domestic uses. This does not, however, change the fact that Plaintiff's April 27, 1992 environmental checklist failed to indicate the source of the water that would be used by the plant. The environmental checklist had asked, "Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known." In response, Plaintiff stated:

> Our present usage as indicated by meters is 4,000 gallons per day.May to October.

Exhibit 10 to Affidavit of Marc Bordsen, Environmental Checklist, p. 3. The Board found that Plaintiff had failed to disclose the source of the water to be used, but not that he made any misrepresentations in this regard. A plain reading of Plaintiff's environmental checklist reveals that this is true.

As to the flood plain issue, the Board found Plaintiff had misrepresented (but not failed to disclose) that part of his site was within the flood plain. The Environmental checklist had asked, "Does the proposal lie within a 100-year floodplain? If so, note location on the site plan," to which Plaintiff had responded "No." Exhibit 10, Environmental Checklist ¤ 5, p. 3. Both the evidence before the Board at that time and the evidence later presented by Plaintiff indicate that some portion of Plaintiff s site was in the flood plain, though they differ in their calculations as to what amount. As such, the Board's conclusion that Plaintiff had made a misrepresentation in his application is accurate. Admittedly, had a hearing been held, Plaintiff might have presented his view that the proposal was not within the flood plain area because the land therein was not going to actually be used in the plant's operations. Although Plaintiff was later granted a mitigated DNS, at the time of submission of his original DNS, he did not have a reasonable expectation of preventing revocation of the DNS. Accordingly, there was no protectable property interest therein. Without a protectable property interest, Plaintiff cannot pursue a substantive or procedural due process claim under 42 U.S.C. 1983 and summary judgment is granted on these claims.

**c. Equal Protection**

The Amended Complaint alleges that Defendant deprived Plaintiff of his rights under the Equal Protection Clause. Liability for a violation of Plaintiff s Equal Protection rights would depend on his ability to prove that (1) he, as compared with others similarly situated, was selectively

treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure him. *LeClair v. Saunders*, 627 F.2d 606, 609 (2d Cir. 1980).

Although discriminatory intent may be proved by direct or indirect evidence, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991),

Plaintiff's Equal Protection Claim must fail because he has done neither. The only evidence of any so-called bad faith can be found in the failure to strictly define and maintain a withdrawal procedure and the comments Plaintiff alleges were made by unidentified County Commissioners indicating that he would never get the Ranninger Site re-zoned. Although he asks the Court to infer malicious intent, there is too little evidence indicating that Plaintiff s DNS was dealt with in a manner reflecting bad faith on the part of Whitman County officials to raise a question of fact to contradict the presumption of honesty and integrity on the part of decision-makers. *See Tyson*, 920 F. Supp. at 1061 (citing *Stivers v. Pierce*, 71 F.2d 732, 741 (9th Cir. 1995)).

**d. Takings**

Defendant argues, and Plaintiff concedes, that the Fifth Amendment takings claim is unripe as Plaintiff has not sought compensation through the State's procedures before turning to this tribunal for redress. *Williamson County Regional Planning Comm'n v.Hamilton Bank*, 473 U.S. 172,194-95 (1985). Accordingly, this claim is dismissed.

**Accordingly, IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment (**Ct. Rec. 67**) is **GRANTED.**

2. Defendant's Motion for Dismissal or Other Sanctions for Discovery (**Ct. Rec.48**) is **DENIED as moot.**

3. Defendant's Motion for Dismissal Based on Insufficiency of Service of Process (**Ct. Rec. 80**) is **DENIED.**

IT IS SO ORDERED. The Clerk is directed to enter this order and to provide copies to counsel.

DATED this 30 day of January, 1997.

/S/

ROBERT H. WHALEY
United States District Court

Q:\C1VIL.95\G00DSPEE.SJ

Note- Above order filed January 31, 1997 by James Larsen, Clerk

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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRAD M. GOODSPEED, dba Pacwest Premix Inc.; PACWEST PREMIX,

Plaintiffs-Appellants,

v.

WHITMAN COUNTY,

Defendant-Appellee.

No. 97-35227
D.C. No. CV-95-00229-RHW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Submitted September 14, 1998**

Before: O'SCANNLAIN, FERNANDEZ and TASHIMA, Circuit Judges.

Brad M. Goodspeed appeals pro se the district court's entry of summary judgment against him in his 42 U.S.C. 1983 lawsuit alleging

violations of the Fourteenth Amendment. We have jurisdiction pursuant to 28 U.S.C. 1291, and we affirm.

This court reviews de novo the district court's grant of summary judgment. *See Wedges/Ledges of California v. City of Phoenix*, 24 F.3d 56, 61 (9th Cir. 1994). We agree with the district court: Goodspeed's substantive and procedural due process claims fail because he has not shown a protected property interest under state law, see id. at 62, and his equal protection claim fails because there is no evidence that Goodspeed was treated differently from others similarly situated, *see Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1240 (9th Cir 1994).

AFFIRMED.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The Above Memorandum was filed September 18, 1998 by Cathy A. Catterson, clerk U. S. Court of Appeals for the Ninth Circuit.

Supreme Court, U.S.
FILED
MAY 4 1999
OFFICE OF THE CLERK

No. 98-1602

In The

# Supreme Court of the United States

BRAD M. GOODSPEED and PACWEST PREMIX, INC.,

*Petitioners,*

v.

WHITMAN COUNTY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Washington's State Environmental Protection Act (SEPA), Chapter 43.21C RCW, creates a property interest protected by the Fourteenth Amendment of the United States Constitution in a threshold determination of environmental non-significance procured by misrepresentation and/or lack of a material disclosure.

2. Whether the Due Process Clause of the Fourteenth Amendment is violated when a threshold determination of environmental non-significance procured by misrepresentation and/or lack of a material disclosure is withdrawn pursuant to a process which permits subsequent review.

3. Whether the Ninth Circuit Court of Appeals erred in affirming the United States District Court's Order of Summary Judgment dismissing the Petitioner's Equal Protection claim for lack of any evidence that he was treated differently than others similarly situated.

## PARTIES TO THE PROCEEDING

PacWest Premix, Inc. is a Washington corporation solely owned by Petitioner Brad M. Goodspeed.

Respondent Whitman County is a political subdivision of the State of Washington. Though the Petitioner's Complaint named several defendants, all but Whitman County were dismissed by agreed order.

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## STATEMENT OF THE CASE

### 1. Procedural History

On June 16, 1995, the Petitioner, Brad M. Goodspeed, individually and for PacWest Premix, Inc. (together below "Mr. Goodspeed"), commenced this action in the United States District Court, Eastern District of Washington, alleging that Whitman County had violated his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution by withdrawing a threshold determination of environmental non-significance (DNS) with respect to a proposed building site.

Whitman County withdrew the threshold determination which it had issued pursuant to Washington's State Environmental Protection Act (SEPA), Chapter 43.21C RCW, after discovering that information contained in Mr. Goodspeed's Environmental Checklist was materially false and/or incomplete.

The Honorable Robert H. Whaley of the United States District Court, Eastern District of Washington, granted summary judgment dismissing Mr. Goodspeed's claims on January 30, 1997 (order filed January 31, 1997). Judge Whaley's decision, in relevant part, held that SEPA did not confer any constitutionally protected property right in a "threshold determination" procured by misrepresentation or lack of material disclosure. Judge Whaley also dismissed Mr. Goodspeed's equal protection claim, holding that he had produced no evidence he had been treated differently than others similarly situated or that Whitman County's actions were in any way done with a "malicious or bad faith intent to injure him." Order

Granting Summary Judgment, Section 2(d), Appendix A-12.[1]

In an unpublished opinion, the Ninth Circuit Court of Appeals affirmed the decision of the District Court. Appendix A-15 through A-16.

Nevertheless and despite the fact that he ultimately completed his project with the benefit of the necessary permits, Mr. Goodspeed continues to allege that he has a constitutionally protected interest in the original DNS.

**2. Statement of Facts**

Anticipating the termination of his lease for the Idaho site at which he operated a concrete pre-mix plant, Mr. Goodspeed began a search in June of 1991 for a new plant location.

Looking to neighboring Whitman County in the State of Washington, Mr. Goodspeed first identified the so-called "Ranniger site" which was only zoned for agricultural use, not "heavy industrial," the zone classification required for a cement plant. Order Granting Summary Judgment, Appendix A-4 through A-5. Consequently, Mr. Goodspeed applied to re-zone the site. *Id.* After completing the environmental review process, he abandoned the Ranniger site and the requested zone change for it in favor of the so-called "Garrett site" (the property which gives rise to this lawsuit) which was already zoned for heavy industrial use. *Id.*

---

[1] Petitioner's Appendix is designated "A-1 through A-16." Respondent's Appendix is designated "B-1 through B-13."

Therefore, the parties' interactions with respect to the Ranniger site are irrelevant to this lawsuit.

(Though the Petitioner implies that he was effectively compelled to abandon the Ranniger site because it was "rumored" he would not be successful in securing the necessary zone change, he has never made any claim, constitutional or otherwise, with respect to it. In considering Whitman County's Motion for Summary Judgment and in order to clearly identify the Petitioner's claims, the District Court inquired of Mr. Chris A. Johnson, then Mr. Goodspeed's counsel,[2] as follows:

THE COURT: Are you making any claim for the handling of the Ranniger site or is this really focused on the Garrett site?

MR. JOHNSON: Focused on the Garrett site, Your Honor.

THE COURT: All right. So we can – the Ranniger site is background, but you are not claiming constitutional deprivation with respect to that site?

MR. JOHNSON: Correct . . .

Transcript of Hearing on Motion for Summary Judgment, Appendix B-1.

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[2] Though the Petitioner's initial Complaint was *pro se*, he had the benefit of counsel on his Amended Complaint and in all matters thereafter before the United States District Court, including the dispositive hearing on Whitman County's Motion for Summary Judgment.

Since the courts below were never asked by the Petitioner to, and did not, address any issue relative to the Ranniger site, this Court's review should be limited to his claims as to the Garrett site.)

After purchasing the Garrett site for the cement plant, on April 27, 1992, Mr. Goodspeed submitted an Environmental Checklist on it to Whitman County. Order Granting Summary Judgment, Appendix A-5. Based on the information contained in it, on April 30, 1992, Mark Bordsen, the Whitman County Planner, issued a threshold determination that the proposed concrete plant would have no significant environmental impact. *Id.* A mandatory comment period ensued and a deadline to appeal Mr. Bordsen's decision was set for June 10, 1992; Mr. Goodspeed was so informed by letter providing:

> . . . We expect that all parties will have received this notification and decision by Tuesday, May 26, 1992, and have therefore set the end of this appeal period for June 10, 1992. **This decision allows the applicant to proceed with other permit applications as needed *at the applicant's own risk that the decision could be appealed and overturned.***

*Id.*, (emphasis in original). Appendix A-5 through A-6.

During the appeal period, Whitman County received numerous letters from the public expressing concerns over the impact of Mr. Goodspeed's proposed concrete pre-mix plant. *Id.* In addition to the issues identified and considered by Whitman County in reviewing Mr. Goodspeed's environmental checklist, these letters revealed two significant issues not previously identified due to the

false and/or incomplete information supplied by Mr. Goodspeed in his checklist.

First, a question was raised with respect to whether the proposed plant was located within a 100-year flood plain. *Id.*, Appendix A-6. In Mr. Goodspeed's environmental checklist, he had indicated "No" to the question "Does the proposal lie within a 100-year flood plain?" *Id.* Subsequent review of the site, however, revealed that the proposed plant was within a 100-year flood plain established by the Flood Insurance Rate Maps published by the U.S. Department of Housing and Urban Development which had been incorporated by reference into the Whitman County Zoning Ordinance. *Id.*, Appendix A-7.

Second, the owners of an adjacent property, Mr. and Mrs. Wendt, expressed concern as to whether the well they shared with the Garrett site was capable of producing sufficient water volume for their residence and the proposed pre-mix plant. *Id.*, Appendix A-6. The Environmental Checklist had inquired on the subject as follows:

> Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known.

*Id.* In response, Mr. Goodspeed disclosed only the following information:

> Our present usage as indicated by meters is 4,000 gallons per day. May to October.

Order of Summary Judgment, Appendix A-6, citing, Environmental Checklist, at 4, § 3(b)(1).

Nowhere did Mr. Goodspeed disclose that his intended source of water was off-site and shared.

On June 12, 1992, after Mr. Bordsen raised these issues with him, Mr. Goodspeed first asserted that he only intended to use the well shared with the Wendts as a source for his plant's domestic water. Order of Summary Judgment, Appendix A-7. He went on to advise that he had secured an agreement with another adjacent landowner to use yet another off-site well to supply production water. *Id.*

Finding that Mr. Goodspeed had failed to disclose these issues and that they were material, the Whitman County Board of Commissioners (Board of Commissioners) withdrew the DNS pursuant to Washington Administrative Code (WAC) 197-11-340 which *requires* withdrawal if:

> . . . (iii) The DNS was procured by misrepresentation or lack of material disclosure;. . . .

WAC 197-11-340(3)(a)(iii) (See Appendix B-5); Order Granting Summary Judgment, Appendix A-7.

Following such a withdrawal, the same regulation required Whitman County to complete a new checklist. WAC 197-11-340(3)(a)(iii).

On July 6, 1992, Whitman County forwarded its environmental checklist to Mr. Goodspeed. Order Granting Summary Judgment, Appendix A-8. Upon review, the Petitioner decided to accept a Mitigated Determination of Non-Significance (MDNS), which was issued on July 21, 1992. *Id.*

Following expiration of the public comment period, notice of the issuance of the MDNS, together with notice

of the applicable appeal period, was published. *Id.* Appeals were filed on September 11, 1992, and a hearing was held before the Board of Commissioners on October 5, 1992. *Id.* On November 9, 1992, the Board of Commissioners affirmed issuance of the MDNS and entered Findings of Fact and Conclusions of Law consistent with its holding. *Id.*

Thereafter, Mr. Goodspeed constructed and operated a concrete pre-mix plant at the Garrett site.

## ARGUMENT

### 1. No Compelling Reason Exists to Grant Certiorari

#### 1.1 The Criteria Established in Supreme Court Rule 10 and This Court's Prior Decisions Show Review Should Not Be Granted

Review on a writ of certiorari is not a matter of right but, rather, one of judicial discretion. S.Ct.R. 10. While not controlling the Court's discretion, Supreme Court Rule 10 outlines the criteria the Court considers in determining whether to grant review. Such relief is granted by the Court only for compelling reasons. S.Ct.R. 10.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. S.Ct.R. 10.

Consistent with Rule 10, the Court has held that it is not its role to correct evidentiary errors or determine whether evidence supports the judgment of the courts below. *Nat'l Labor Relations Bd. v. Pittsburgh Steamship Co.,*

340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed 479 (1951); *Gen'l Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-9, 58 S.Ct. 849, 82 L.Ed. 1273 (1938) (certiorari not warranted merely to review the evidence or inferences drawn from it). In *Pittsburgh Steamship Co., supra*, the Court said:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony. . . . In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Fed. Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193.

*Pittsburgh Steamship Co.*, 340 U.S. at 503.

Similarly, when the issue for review presents a question of state law the Court will "ordinarily accept the determination of local law by the Court of Appeals . . . " *Comm'r of Internal Revenue v. Est. of Bosch*, 387 U.S. 456, 462, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (citations omitted).

In *Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944), the Supreme Court reviewed a determination of the Tenth Circuit regarding Oklahoma tax law. Subsequent to the Tenth Circuit's decision, the Oklahoma Supreme Court issued opinions raising "such doubt

as to the applicable Oklahoma law as to require its reexamination." *Huddleston*, 322 U.S. at 236. Rather than deciding the case, the Supreme Court remanded the case to the Tenth Circuit, "without passing" on the contentions of the parties. *Id.* 322 U.S. at 237. In reaching this conclusion, the Court indicated:

> [O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions.

*Id.* 322 U.S. at 237 (citations omitted).

In this case, none of the factors in Supreme Court Rule 10 or the reasons this Court has outlined in its prior decisions suggest that review is appropriate. Furthermore, the issues herein are of a type this Court has traditionally left to the lower federal courts.

The Petitioner has failed to identify any compelling reason for this Court to grant review, essentially utilizing his Petition to simply reproduce the brief he submitted to the Ninth Circuit Court of Appeals.

Citing only one case from the United States court of appeals, *Wedges/Ledges of California, Inc. v. City of Phoenix, Arizona*, 24 F.3d 56 (9th Cir. 1994), and no state cases at any level, the Petitioner has identified no judicial conflict, whether between the circuit courts or between the Ninth Circuit and either the Washington or United States

Supreme Court. The Respondent knows of no such conflict which would have bearing on this case.

The Petitioner's arguments are as follows:

1. As an evidentiary issue, there was no basis to find he either engaged in misrepresentation or failed to make a material disclosure. Petition for Writ of Certiorari, p. 17;

2. That the courts below incorrectly applied Washington's State Environmental Policy Act (SEPA) in concluding that the law did not create a protected property interest; *see* Petition For Writ of Certiorari, pp. 13-16; and

3. That Petitioner introduced enough evidence relevant to his equal protection claim to survive summary judgment. Petition For Writ of Certiorari, pp. 19-21.

Note also that each of these contentions fundamentally raise only issues relative to the proper interpretation of state law and/or the evaluation of evidence. Therefore, even assuming the courts below were in error, it is not the role of this Court to correct such matters.

To the extent the lower courts applied federal constitutional law, the constitutional principles at issue have been thoroughly developed by this Court. There is no undecided issue of federal law or any need for this Court to settle any constitutional issue arguably implicated by the Petition. *See*, S.Ct.R. 10(c).

Therefore, lacking any compelling reason for review, this Petition should be denied.

### 1.2 The Constitutional Issues Relevant to This Case Have Been Clearly Defined by This Court's Prior Decisions

Here, the central constitutional question is whether Mr. Goodspeed had a "property interest" protected by the Fourteenth Amendment to the United States Constitution. This question was thoroughly addressed by this Court's decision in *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In *Roth*, an untenured assistant professor at Wisconsin State University, contended his right to due process guaranteed under the Fourteenth Amendment was violated when the university failed to re-hire him after the expiration of his one-year employment contract. In considering whether Roth had any constitutionally protected interest, the Court discussed in detail the "attributes" of property interests protected by the Due Process Clause of the Fourteenth Amendment. *Roth*, 408 U.S. at 577. There, the Court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. . . .
>
> . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits.

*Roth*, 408 U.S. at 577.

In the years since *Roth* was decided, this Court has adhered to the constitutional principles outlined in it. *See Phillips et al. v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); *Delaware v. New York*, 507 U.S. 490, 113 S.Ct. 1550, 123 L.Ed.2d 211 (1993); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (defamation alone does not give rise to due process claim without deprivation of some constitutionally protected interest as outlined in *Roth*).

In *Peer v. Griffeth*, 445 U.S. 970, 100 S.Ct. 1348, 64 L.Ed.2d 247 (1980), the Court denied a Petition for Certiorari wherein the petitioner alleged he was deprived of due process when his right to state welfare benefits were denied for failure to meet requirements imposed by state law. Chief Justice Rehnquist dissented, indicating, in his opinion, that the Court of Appeals, Ninth Circuit, had extended the Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), not only to welfare recipients, but also to welfare applicants. In concluding that such an extension of the Court's ruling merited plenary review, Justice Rehnquist discussed the status of *Roth*, saying:

> There has been much decisional law from this and other courts, and much scholarly commentary as to what is a protected "property" interest under the Fourteenth Amendment's Due Process Clause, and what procedural guarantees are necessary under that Clause before one may be denied such a property interest. *See*, e.g., *Goldberg v. Kelly, supra; Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); Van Alstyne, *Cracks in "The New*

> *Property": Adjudicative Due Process in the Administrative State,* 62 Cornell L.Rev. 445 (1977). Obviously **this Court cannot parse every state-law provision to determine whether it creates a protected "property interest"** under the Due Process Clause of the Fourteenth Amendment.

*Peer,* 445 U.S. at 970 (emphasis added).[3]

In this case, there is no suggestion that the rule of law established in *Roth* is in need of clarification or was improperly applied by the courts below.

Based on the principles in *Roth,* any constitutional issue herein turns on interpretation of state law, that is, whether SEPA conferred a property interest on Mr. Goodspeed when he received a DNS issued on the basis of false and/or incomplete information supplied by him.

Granting review would require this Court to "parse" through the Washington State Environmental Policy Act, applying *settled* constitutional principles.

Review should not be granted; there is no important, undecided federal question presented by this Petition and there is no conflict between the Ninth Circuit's decision herein and those of this Court, any other United States court of appeals or the Washington State Supreme Court.

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[3] Justice Rehnquist ultimately concluded that consideration of whether the Constitution provides protection, independent of any state law, was particularly important where state law does not create protected property interests.

**2. The Court Below Properly Applied Washington State's Environmental Policy Act in Concluding No Constitutionally Protected Interest Existed**

Washington's SEPA requires that "environmental amenities and values be given appropriate consideration" when governmental agencies make land use decisions. *Anderson v. Pierce County*, 86 Wash. App. 290, 300, 936 P.2d 432 (1997), *citing* RCW 43.21C.030(2)(b). A key step in the SEPA process is making a "threshold determination" whether the project will have a "probable significant adverse environmental impact." *Pease Hill Community v. County of Spokane*, 62 Wash. App. 800, 809, 816 P.2d 37 (1991); *see also*, WAC 197-11-330 through WAC 197-11-340. At this initial stage, if the project is held to have a probable significant adverse environmental impact, an Environmental Impact Statement (EIS) is required; if not, a Determination of Non-Significance (DNS) is issued and no EIS is required. WAC 197-11-330.

In order to make this initial determination, the SEPA process is initiated by the applicant submitting an Environmental Checklist which Washington Courts have indicated must:

> Provide information reasonably sufficient to evaluate the environmental impact of the proposal.

*Anderson v. Pierce County*, 86 Wash. App. 290, 301, 936 P.2d 432 (1997). The responsible official must then "thoroughly consider a proposal's potential environmental significance as documented in the environmental checklist." *Id., citing* WAC 197-11-315(1)(a).

In making a threshold determination, a governmental agency must demonstrate that the environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA. *Sisley v. San Juan County*, 89 Wash.2d 78, 85, 569 P.2d 712 (1977); *Pease Hill Community Group v. County of Spokane*, 62 Wash. App. 800, 809-10, 816 P.2d 37 (1991). Such a threshold determination must be based on a review reasonably sufficient to determine the environmental impact of a proposal. *Pease Hill*, 62 Wash. App. at 810.

After the threshold determination is made, SEPA requires a mandatory 15-day public comment period. WAC 197-11-340 (1992). Based on these comments:

> [t]he responsible official . . . may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS.

WAC 197-11-340(2)(f). Threshold determinations may be appealed administratively, if permitted by local agency procedures. RCW 43.21C.075(3)(a) (1992). Whitman County provided such appellate procedures by Whitman County Ordinance 9.04.080(C) (1979).

SEPA regulations require that an agency *shall* withdraw a DNS if:

1. There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

2. There is significant new information indicating, or on, a proposal's probable significant adverse environmental impact; or

> 3. The DNS was **procured by misrepresentation or lack of material disclosure**. . . .

WAC 197-11-340, Appendix B-5 (emphasis added).

Washington courts have consistently held that land use determinations issued based on false information or in violation of a statute are void at their inception. *See, Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 481-4, 513 P.2d 36 (1973). Such a land use determination confers no rights. *Id.*

This longstanding principle of Washington law was first discussed by the Washington State Supreme Court in *Nolan v. Blackwell*, 123 Wash. 504, 212 P. 1048 (1923). There, a building permit was issued by the City of Seattle under the misunderstanding that the building was to be constructed in the fourth district of the city where such a building was permitted. In fact, the building was to be constructed in the second district where such a building was prohibited.

After the permit was revoked, Mr. Nolan, the landowner, brought suit alleging he had a vested right in the permit. The Washington State Supreme Court rejected this contention, stating:

> The permit being in violation of the ordinance, and having been issued under a mistake of fact, it conferred no right upon the respondent. . . .
>
> . . . That a building permit was issued in violation of law or under mistake of fact confers no rights is well established.

*Nolan*, 123 Wash. at 506.

Subsequent to *Nolan*, the Washington courts have continued to hold that no interest is created in a property determination based on errors of fact. *See, Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 484, 513 P.2d 36 (1973); *Steele v. Queen City Broadcasting Co.*, 54 Wash.2d 402, 408, 341 P.2d 499 (1959); *Indus. Hydraulics v. City of Aberdeen*, 27 Wash. App. 123, 124-5, 619 P.2d 980 (1980); *J & B Dev. Co., Inc. v. King County*, 29 Wash. App. 942, 631 P.2d 1002 (1981).

Accordingly, Washington courts have held that building permits issued without compliance with SEPA are void. *Eastlake Community Council*, 82 Wash.2d at 487-99; *see also, Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 745 P.2d 1328 (1987) (vested right doctrine applies to SEPA).

In this case, the courts below properly applied Washington law in concluding that a SEPA determination based on a mistake of fact conferred no rights upon Mr. Goodspeed. Whitman County issued the DNS under the mistaken belief that Mr. Goodspeed had accurately represented that the project was not in a flood plain and that its water use would not adversely affect other properties. Mr. Goodspeed's failure to provide material information "reasonably sufficient to evaluate" the impact of the proposal made it impossible for Whitman County to fulfill its statutory duties under SEPA.

Petitioner's argument that summary judgment was inappropriate because he did not make any misrepresentations or fail to disclose material information is without merit.

In resisting a motion for summary judgment, Mr. Goodspeed cannot simply rest on conclusory allegations. *See, Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 757-8 (4th Cir. 1996) (plaintiffs could not rely on complaint's unsupported allegations to resist summary judgment). Contrary to his answer in the Environmental Checklist, Mr. Goodspeed admits that 7% of the project was, in fact, on the flood plain. Petition for Writ of Certiorari, pp. 7-8 and 17-18. Given this admission, there can be no question that Judge Whaley's judgment was correct in concluding that Mr. Goodspeed made a misrepresentation with respect to or failed to disclose this circumstance on his Environmental Checklist.

As the DNS was clearly issued on the basis of false and/or incomplete information which Whitman County took to be correct, the DNS was void at its inception. Accordingly, Mr. Goodspeed never acquired any constitutionally protected property interest under Washington State law.

In short, the Petition should be denied because the Ninth Circuit and the District Court properly interpreted and applied Washington State law and the Petitioner raised no genuine issue of material fact which precluded resolution of the case by summary judgment.

### 3. Petitioner's Equal Protection Claim Has No Merit

The Equal Protection Clause of the Fourteenth Amendment, § 1, provides that no state shall "deny to any person within its jurisdiction equal protection of the laws." The Equal Protection Clause does not forbid classifications; instead, it:

> [S]imply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

*Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992).

In order to prevail on an equal protection claim, the claimant must show that the state acted with some discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239-40, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), *reh'g denied*, 482 U.S. 920. In *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), the Court explained:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

*Feeney*, 442 U.S. at 279 (citation and footnote omitted).

No equal protection claim exists where no showing is made that anyone comparably situated has been treated differently than the petitioner. *Nordlinger*, 505 U.S. at 10; *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971); *Christian Gospel Church v. San Francisco*, 896 F.2d 1221 (9th Cir. 1990). Accordingly, the Court has dismissed equal protection claims where the petitioner has not identified any disparate treatment. *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 41, 75 S.Ct. 92, 99 L.Ed. 46 (1954) (no difficulty with Equal Protection

Clause claim because "no showing has been made that anyone comparably situated has been treated differently from petitioner.")

In *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), the Court considered whether a criminal defendant's equal protection interests were violated when the state courts failed to provide him procedural safeguards ordinarily afforded others. The Court held that misapplication of state law, without a showing of invidious discrimination, does not violate the Equal Protection Clause. *Id.* at 554. In reaching this conclusion, the Court said:

> [T]he petitioner's argument comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . . " Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.

*Beck*, 369 U.S. at 554-5 (citation and internal quotations omitted).

Here, the Petitioner has not argued below that he was treated differently than anyone "similarly situated" or that he was discriminated against because of his membership in any class. For these reasons alone, Mr. Goodspeed's claim must fail.

Even if there was disparate treatment, however, Mr. Goodspeed must show that it was the result of

purposeful discrimination against him. He has made no such showing.

Accordingly, the Petitioner's equal protection claim does not present any important issue of federal law for resolution. *See* S.Ct.R. 10. Therefore, any review of this claim would necessarily and simply involve evaluating the evidence and affirming the clearly correct rulings below. Review for such purpose should not be granted.

## CONCLUSION

The Petition discloses no compelling reason to grant it. It implicates no important unresolved federal question nor any decisional conflict requiring this Court's review. The decision of the Ninth Circuit Court of Appeals was the product of proper jurisprudence and a proper application of Washington State law.

Therefore, Respondent requests that the Court deny this Petition for Writ of Certiorari.

DATED: May 4, 1999.

Respectfully submitted,

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# APPENDIX B

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I. RELEVANT EXCEPTIONS OF RECORD

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## Appendix B-1

Excerpt of the Hearing on Motion for Summary Judgment and Motion for Dismissal of January 24, 1997, p. 18:

THE COURT: Are you making any claim for the handling of the Ranniger site or is this really focused on the Garrett site?

MR. JOHNSON: Focused on the Garrett site, Your Honor.

THE COURT: All right. So we can – the Ranniger site is background, but you are not claiming constitutional deprivation with respect to that site?

MR. JOHNSON: Correct, it is important that of what process was put into place at that time, however. At the Garrett site a SEPA checklist was submitted again.

WAC 197-11-315. Environmental checklist.

(1) Agencies:

(a) Shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals, except for: Public proposals on which the lead agency has decided to prepare its own EIS, or proposals on which the lead agency and applicant agree an EIS will be prepared.

(b) May use an environmental checklist whenever it would assist in their planning and decisionmaking, but shall not require an applicant to prepare a checklist under SEPA, unless a checklist is required by (1)(a) of this section.

(2) The lead agency shall prepare the checklist or require an applicant to prepare the checklist.

(3) The items in the environmental checklist are not weighted. The mention of one or many adverse environmental impacts does not necessarily mean that the impacts are significant. Conversely, a probable significant adverse impact on the environment may result in the need for an EIS.

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WAC 197-11-330. Threshold determination process.

An EIS is required for proposals for legislation and other major actions significantly affecting the quality of the environment. The lead agency decides whether an EIS is required in the threshold determination process, as described below.

(1) In making a threshold determination, the responsible official shall:

(a) Review the environmental checklist, if used:

(i) Independently evaluating the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist; and

(ii) Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant.

(b) Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (WAC 197-11-960), and any additional information furnished under WAC 197-11-335 and 197-11-350; and

(c) Consider mitigation measures which an agency or the applicant will implement as part of the proposal.

(2) In making a threshold determination, the responsible official should determine whether:

(a) All or part of the proposal, alternatives, or impacts have been analyzed in a previously prepared environmental document, which can be adopted or incorporated by reference (see Part Six).

(b) Environmental analysis would be more useful or appropriate in the future in which case, the agency shall commit to timely, subsequent environmental review, consistent with WAC 197-11-055 through 197-11-070 and Part Six.

(3) In determining an impact's significance (WAC 197-11-794), the responsible official shall take into account the following, that:

(a) The same proposal may have a significant adverse impact in one location but not in another location;

(b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;

(c) Several marginal impacts when considered together may result in a significant adverse impact;

(d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.

(e) A proposal may to a significant degree:

(i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;

(ii) Adversely affect endangered or threatened species or their habitat;

(iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; and

(iv) Establish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or may affect public health or safety.

(4) If after following WAC 197-11-080 and 197-11-335 the lead agency reasonably believes that a proposal may have a significant adverse impact, an EIS is required.

(5) A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

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WAC 197-11-340. Determination of nonsignificance (DNS).

(1) If the responsible official determines there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a determination of nonsignificance (DNS) substantially in the form provided in WAC 197-11-970. If an agency adopts another environmental document in support of a threshold determination (Part Six), the notice of adoption (WAC 197-11-965) and the DNS shall be combined or attached to each other.

(2) When a DNS is issued for any of the proposals listed in (2)(a), the requirements in this subsection shall be met.

(a) An agency shall not act upon a proposal for fifteen days after the date of issuance of a DNS if the proposal involves:

(i) Another agency with jurisdiction;

(ii) Demolition of any structure or facility not exempted by WAC 197-11-800 (2)(f) or 197-11-880;

(iii) Issuance of clearing or grading permits not exempted in Part Nine of these rules; or

(iv) A DNS under WAC 197-11-350 (2), (3) or 197-11-360(4).

(b) The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under WAC 197-11-510.

(c) Any person, affected tribe, or agency may submit comments to the lead agency within fifteen days of the date of issuance of the DNS.

(d) The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available.

(e) An agency with jurisdiction may assume lead agency status only within this fifteen-day period (WAC 197-11-948).

(f) The responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or

supporting documents. When a DNS is modified, the lead agency shall send the modified DNS to agencies with jurisdiction.

(3)(a) The lead agency shall withdraw a DNS if:

(i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

(ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or

(iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

(b) Subsection (3)(a)(ii) shall not apply when a non-exempt license has been issued on a private project.

(c) If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination. If a DS is issued, each agency with jurisdiction shall commence action to suspend, modify, or revoke any approvals until the necessary environmental review has occurred (see also WAC 197-11-070).

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RCW 43.21C.075. Appeals.

(1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall not allow more than one agency appeal proceeding on a procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement), consistent with any state statutory requirements for appeals to local legislative bodies. The appeal proceeding on a determination of significance/nonsignificance may occur before the agency's final decision on a proposed action. Such an

appeal shall also be allowed for a determination of significance/ nonsignificance which may be issued by the agency after supplemental review;

(b) Shall consolidate appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) by providing for simultaneous appeal of an agency decision on a proposal and any environmental determinations made under this chapter, with the exception of the threshold determination appeal as provided in (a) of this subsection or an appeal to the local legislative authority under RCW 43.21C.060 or other applicable state statutes;

(c) Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record, consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An electronically recorded transcript will suffice for purposes of review under this paragraph; and

(d) Shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute.

(5) RCW 43.21C.080 establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter. Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use approvals (the "underlying governmental action"). This section does not modify any such time periods. This section governs when a judicial appeal must be brought under this chapter where a "notice of action" is used, and/or where there is another time period which is required by statute or ordinance for challenging the underlying governmental action. In this subsection, the term "appeal" refers to a judicial appeal only.

(a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within thirty days. The agency shall give official notice stating the date and place for commencing an appeal. If there is an agency proceeding under subsection (3) of this section, the appellant shall, prior to commencing a judicial appeal, submit to the responsible official a notice of intent to commence a judicial appeal. The notice of intent shall be given within the time period for commencing a judicial appeal on the underlying governmental action.

(b) A notice of action under RCW 43.21C.080 may be used. If a notice of action is used, judicial appeals shall be commenced within the time period specified by RCW 43.21C.080, unless there is a time period for appealing the underlying governmental action in which case (a) of this subsection shall apply.

(c) Notwithstanding RCW 43.21C.080(1), if there is a time period for appealing the underlying governmental action, a notice of action may be published within such time period.

(6)(a) Judicial review of an appeal decision made by an agency under RCW 43.21C.075(5) shall be on the record, consistent with other applicable law.

(b) A taped or written transcript may be used. If a taped transcript is to be reviewed, a record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to designate only those portions of the testimony necessary to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review. A party may provide a written transcript of portions of the testimony at the party's own expense or apply to that court for an order requiring the party seeking review to pay for additional portions of the written transcript.

(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court

shall certify the final order of the shorelines hearings board and said certified final order may only be appealed to an appellate court.

(8) For purposes of this section and RCW 43.21C.080, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under this chapter (except where the word "action" means "appeal" in RCW 43.21C.080(2) and (3)). The word "action" in this section and RCW 43.21C.080 does not mean a procedural determination by itself made under this chapter. The word "determination" includes any environmental document required by this chapter and state or local implementing rules. The word "agency" refers to any state or local unit of government. The word "appeal" refers to administrative, legislative, or judicial appeals.

(9) The court in its discretion may award reasonable attorneys' fees of up to one thousand dollars in the aggregate to the prevailing party, including a governmental agency, on issues arising out of this chapter if the court makes specific findings that the legal position of a party is frivolous and without reasonable basis.

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Whitman County Ordinance 9.04.080 Environmental checklist.

A. Except as provided in WAC 197-10-300(2), a completed environmental checklist, or a copy thereof, substantially in the form provided in WAC 197-10-365, shall be filed at the same time as an application for a permit,

license, certificate, or other entitlement for use not specifically exempted herein. This checklist shall be the basis for a determination by the county as to lead agency status and, if the county is determined to be the lead agency, then for the threshold determination.

B. For all proposals for which the county is the lead agency, the responsible official of the county shall make the threshold determination pursuant to the criteria and procedures of WAC 197-10-300 through 197-10-365.

C. An individual has the right to appeal the threshold determinations made by the responsible official. Such appeal must be made in writing by letter to the board of county commissioners and said letter must be filed with the county auditor within fifteen days of the issuance of the initial threshold determination by the responsible official. In the event of an appeal, the appeal shall be heard at a regular meeting of the board of county commissioners within thirty days of the filing of the letter of appeal. The date of hearing said appeal shall be set by the chairman of the board of county commissioners. The threshold determination shall be reviewed and may be either upheld or modified by a majority decision of the board of county commissioners. The county auditor shall, at least ten days prior to said meeting, mail notice of the meeting to the appellant, at the appellant's last known address or to the address stated in the letter of appeal. There shall be no right of appeal from a threshold determination made by the responsible official in response to a directive of the board of county commissioners where the directive is the result of an appeal pursuant to this paragraph. (Ord. 31939 §8, 1978).